

the alleged conspirators. Id. The Tenth Circuit has agreed with this notion and has noted that while affidavits under Rule 56(f) should generally be treated liberally, a party's access to witnesses or material is of crucial importance in antitrust cases where the information is likely to be in the sole possession of the opposing party. See Patty Precision, 742 F.2d at 1264. Cases have indicated that where the facts are in the possession of the moving party, a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course. See Costlow v. United States, 552 F.2d 560, 564 (3rd Cir. 1977). EchoStar must be permitted to conduct its basic discovery as the relevant information necessary for an informed response to DIRECTV's motion for summary judgment is mainly in the possession of the defendants (and third parties). Although DIRECTV has produced some relevant information already, the overall volume of documents produced has made a meaningful review of those documents a Herculean task, which has not yet been completed, although it is ongoing.

This crucial importance is also underscored also by the complexity of the claims and the volume of information generally involved in antitrust cases. Indeed, as DIRECTV itself has noted, the sheer volume of documents involved in the present case make even simple tasks extremely time consuming and difficult. Recently, DIRECTV's counsel sent correspondence to EchoStar indicating that DIRECTV believes that it has once again inadvertently produced privileged documents. DIRECTV's counsel further advised that DIRECTV is in the process of reviewing its document production to identify any additional documents that DIRECTV inadvertently produced. DIRECTV admits "Because of the volume of the production, it will take several weeks to complete this process." See Exhibit 1 to Ricketts Dec.

The fact that DIRECTV has already produced a large number of documents does not diminish EchoStar's ability to obtain a Rule 56(f) continuance and actually supports the request. First, it is not practical to quickly review hundreds of thousands of documents to respond to a motion for summary judgment. EchoStar's counsel is working diligently to review these documents, which is a massive and ongoing task. DIRECTV has only recently professed to have completed its production and thus has exclusive control (at a minimum) of tens of thousands of documents responsive to EchoStar's March 14, 2000 document request. The fact that DIRECTV itself was still gathering responsive documents more than six months after the discovery request was served underscores the complexity of this case and the need for more than twenty-five (25) days to respond to the Motion and its thousands of pages of appendices.

DIRECTV would also have the Court believe that it can resolve EchoStar's antitrust claims as a matter of law. However, it is settled law that determining the appropriate relevant market in an antitrust case is a question of fact to be determined after the parties have had the opportunity to conduct appropriate discovery. See, e.g., Eastman Kodak Co. v. Image Technical Svcs., Inc., 504 U.S. 451 (1992) (finding, among other things, that a genuine issue of material fact existed regarding the relevant market); Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 717-20 (3d Cir. 1991) (determining the relevant product market or submarket is "a highly factual issue"); Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745 (10th Cir. 1999).

It is also settled law that the relevant market in an antitrust case can be a submarket of a larger market in which the goods or services of the submarket compete. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) ("well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."); Rothery Storage & Van Co. v.

Atlas Van Lines, Inc., 792 F.2d 210, 218 (D.C. Cir. 1986); FTC v. Staples, Inc., 970 F. Supp. 1066 (D.C. Cir. 1997).

In Staples, the FTC sought a preliminary injunction under Section 7 of the Clayton Act to enjoin the acquisition of Office Depot by Staples, pending a final disposition by the FTC of the legality of the acquisition. "As with many antitrust cases, the definition of the relevant product market in this case is crucial. In fact, to a great extent, this case hinges on the proper definition of the relevant product market." Id. at 1073.

The FTC defined the relevant product market as "'the sale of consumable office supplies through office superstores,' with 'consumable' meaning products that consumers buy recurrently." Id. Staples argued that the relevant product market consisted only of "the overall sales of office products" Id. Staples' market would include a variety of stores (e.g. Wal-Mart); whereas the FTC's market would include only the "office superstores", which are Office Depot, Staples, and OfficeMax. Id. at 1073-75.

The court began its analysis by stating that the relevant product market is determined by looking at the interchangeability of use and cross-elasticity of demand—"i.e. whether there are other products offered to consumers which are similar in character or use to the product or products in question, as well as how far buyers will go to substitute one commodity for another." Id. at 1074. The court noted that although office supplies sold by an office superstore are functionally interchangeable³ with office supplies sold elsewhere, this does not end the analysis.

³ "Whether there are other products available to consumers which are similar in character or use to the products in question may be termed "functional interchangeability." FTC, 970 F. Supp. At 1074.

A court should also consider "the responsiveness of the sales of one product to price changes of the other." Id.

The court acknowledged that there is:

a broad market encompassing the sale of consumable office supplies by all sellers of such supplies, and that those sellers must, at some level, compete with one another. However, the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.

Id. at 1075. The court concluded that the sale of office supplies by an office superstore was a submarket within the larger market of retail office sales for antitrust purposes. Id. The court reached this conclusion largely on the basis of substantial evidence provided by the FTC showing that pricing at office superstores was directly affected by whether or not there was another office superstore in the area. Id. at 1075-80.

Likewise, in this case, EchoStar will demonstrate, once it has a full opportunity to conduct discovery, that the DBS Market is an appropriate submarket of the MVPD Market for antitrust purposes.

Thus, establishing the appropriate relevant market is a highly factual issue and a summary judgment motion should not be considered on this issue at least until after the parties have completed appropriate discovery. Although the parties have been conducting discovery for approximately seven (7) months, the real discovery in this matter has not even begun. While it is true that DIRECTV has produced more than 313,000 of pages of documents as stated above, DIRECTV has only recently professed to have completed its document production.⁴ Although EchoStar's lawyers have been diligently reviewing the hundreds of thousands of documents obtained from DIRECTV and numerous third parties, EchoStar's counsel has not yet had the

⁴ Again, however, EchoStar had not yet had an opportunity to review DIRECTV's documents to verify whether or not DIRECTV has in fact produced all documents responsive to EchoStar's document requests.

opportunity to fully evaluate the documents to assess their relevance to various issues in the case. The process of reviewing and analyzing documents is a Herculean task, requiring work by several lawyers and paralegals. As that task progresses, EchoStar's counsel will gather documents relevant to all of the issues in this case, including documents supporting the fact that the relevant market for the Court to consider is the DBS Market and evidence demonstrating DIRECTV's market power, and the anticompetitive effects caused by exercise of that market power. EchoStar will provide relevant documents to its experts to assist them in formulating their opinions. Expert reports, which will be instrumental in assisting the jury in its determination of the relevant market and market power are not even due until February, 2001.

Nor have any depositions been taken in this matter. The depositions of key DIRECTV executives as well as third-parties will obviously have relevance to determining the relevant market and DIRECTV's market power. To file a Motion for Summary Judgment at such an early stage of litigation, is simply premature.

Until the parties have an opportunity to conduct relevant discovery, the Court cannot sufficiently evaluate defendants' Motion and whether DIRECTV are entitled to summary judgment. The fact that defendants even ask this Court to rule on their Motion in the absence of critical discovery having been conducted suggests that DIRECTV is not interested in this Court learning the truth or even considering all relevant evidence.

The law is well settled: determination of a motion for summary judgment prior to the completion of discovery, as DIRECTV requests, is directly contrary to the policy inherent in Rule 56 of the Federal Rules of Civil Procedure. See Celotex, 477 U.S. at 322 (Rule 56 must be construed "with due regard . . . for the rights of persons asserting claims and defenses that are adequately based on facts to have those claims and defenses tried to a jury"); Anderson, 477 U.S. at 251 n.5, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (summary judgment is a drastic remedy and is therefore granted cautiously).

III. CONCLUSION

For the foregoing reasons, EchoStar respectfully requests that this Court grant EchoStar additional time in which to complete discovery and respond to DIRECTV's Motion pursuant to Rules 6 and 56(f) of the Federal Rules of Civil Procedure.

RESPECTFULLY SUBMITTED this 6 day of November, 2000.

Signed: 

Cynthia A. Ricketts, Arizona Bar No. 012668
Attorneys for EchoStar Communications
Corporation, EchoStar Satellite Corporation, and
EchoStar Technologies Corporation
Address: SQUIRE, SANDERS & DEMPSEY L.L.P.
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004

Phone: (602) 528-4000

Facsimile: (602) 253-8129

T. Wade Welch

T. WADE WELCH & ASSOCIATES

Address: 2401 Fountainview, Suite 215
Houston, Texas 77057

Phone: (713) 952-4334

Fax: (713) 952-4994

Robert B. Silver

Address: BOIES, SCHILLER & FLEXNER LLP
80 Business Park Drive
Suite 110
Armonk, New York 10504

Phone: (914) 273-9800

Facsimile: (914) 273-9810

Address of Plaintiff EchoStar Communications Corporation:
5701 South Santa Fe
Littleton, Colorado 80120

Address of Plaintiff EchoStar Satellite Corporation:
5701 South Santa Fe
Littleton, Colorado 80120

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 07 day of November, 2000, a true and correct copy of the foregoing Request for Rule 56(F) Continuance to Respond to DIRECTV Defendants' Motion for Summary Judgment and Memorandum of Law in Support Thereof has been forwarded in the following manner to the following attorney(s) of record, in accordance with the Federal Rules of Civil Procedure:

John A. DeSisto, Esq.
Featherstone DeSisto LLP
600 17th Street, Suite 2400
Denver, Colorado 80202

By: U.S. Mail

J. Thomas Rosch
Daniel Wall
Latham & Watkins
505 Montgomery Street, Suite 1900
San Francisco, CA 94111-2562

By: U.S. Mail

Eric C. Liebeler
Alexander F. MacKinnon
Kirkland & Ellis
777 South Figueroa Street
Los Angeles, California 90017

By: U.S. Mail

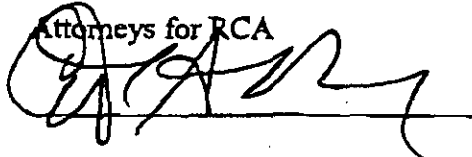
Attorneys for DirecTV and Hughes Network Systems

Gregory J. Kerwin, Esq.
Gibson, Dunn & Crutcher LLP
1801 California Street, Suite 4100
Denver, Colorado 80202-2641

By: U.S. Mail

James R. Loftis, III
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

By: U.S. Mail

Attorneys for RCA


**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 00-K-212

EHOSTAR COMMUNICATIONS CORPORATION, a
Nevada corporation; EHOSTAR SATELLITE
CORPORATION, a Colorado corporation; EHOSTAR
TECHNOLOGIES CORPORATION, a Texas corporation,

Plaintiffs,

v.

DIRECTV ENTERPRISES, INC., a Delaware corporation;
DIRECTV, INC., a California corporation; DIRECTV
MERCHANDISING, INC., a Delaware corporation;
DIRECTV OPERATIONS, INC., a California corporation;
HUGHES NETWORK SYSTEMS, a Delaware corporation,
THOMSON CONSUMER ELECTRONICS, INC.,
d/b/a, RCA, a Delaware corporation,

Defendants.

DECLARATION OF CYNTHIA A. RICKETTS

Pursuant to 28 U.S.C. § 1746, Cynthia A. Ricketts declares and states as follows:

1. I am a partner with the law firm of Squire, Sanders & Dempsey L.L.P. ("SS&D") and am admitted to the United States District Court for the District of Colorado. SS&D is one of the law firms that represents plaintiffs EchoStar Communications Corporation, EchoStar Satellite Corporation and EchoStar Technologies Corporation (collectively, "EchoStar") in the above-captioned matter, and I am one of the attorneys representing EchoStar herein. I have personal knowledge of the matters set forth herein or have knowledge of the matters as a result of SS&D's

representation of EchoStar in this matter, except to the extent statements are based upon information and belief, and as to all such matters, I believe them to be true.

2. This Declaration is made in support of EchoStar's Request for Rule 56(f) Continuance to Respond to Motion for Summary Judgment ("Motion") filed by DIRECTV Enterprises, Inc., DIRECTV, Inc., DIRECTV Merchandising, Inc. and DIRECTV Operations, Inc. (collectively, "DIRECTV").¹

3. As set forth herein, I believe that the Court should postpone ruling on DIRECTV's Motion in order to allow the parties an opportunity to conduct discovery that is directly related to the very claims that are the subject of DIRECTV's Motion. The parties should be allowed to conduct relevant discovery that is currently scheduled, anticipated, has been propounded or is in dispute, as set forth in detail below, prior to the June 1, 2000 discovery cutoff before being required to substantively respond to DIRECTV's Motion.

4. EchoStar is requesting this continuance in order to conduct additional discovery, evaluate and analyze the voluminous document discovery conducted to date, and properly and substantively respond to DIRECTV's Motion.

I. PROCEDURAL OVERVIEW OF CASE

5. EchoStar's Complaint was filed on February 1, 2000.

6. DIRECTV's Answer and Counterclaim was filed on March 13, 2000. In addition, defendants Hughes Network Systems ("Hughes") and Thomson Consumer Electronics, Inc., d/b/a RCA ("RCA") filed their Answers on March 13, 2000.

7. This case was originally assigned to the Hon. Clarence Brimmer, who set a discovery cutoff of July 21, 2000.

8. On April 28, 2000, the case was reassigned to the Honorable John L. Kane, Jr.

9. On June 27, 2000, Magistrate Judge Michael J. Watanabe held a status conference to discuss various matters, including revisions to the case management plan and schedule, which had been vacated during a telephonic conference among and between the parties during May, 2000.

10. On July 20, 2000, Magistrate Judge Michael J. Watanabe issued a revised Scheduling Order effective June 27, 2000, setting forth the following deadlines that are relevant to DIRECTV's Motion:

- Expert witness disclosures: February 15, 2001
- Rebuttal expert witness disclosures: March 15, 2001
- Last day to notice depositions and issue third party-subpoenas April 20, 2001
- Discovery cutoff June 1, 2001
- Dispositive motion cutoff July 13, 2001

11. EchoStar has been diligently conducting its investigation and discovery, both formal and informal, since the inception of this case in February 2000. For example, EchoStar served both requests for production of documents and interrogatories upon the defendants on the very first day that it was allowed to do so under the Federal Rules of Civil Procedure.

¹ This Declaration is made to comply with Rule 56(f) of the Federal Rules of Civil Procedure and is not intended to be a waiver of the attorney-client privilege or the applicable attorney work

12. Completing discovery in this complex antitrust action, however, is no easy task. It involves the review and analysis of more than 3.0 million² pages of documents (that have already been produced by the parties and third parties), and depositions and interviews of more than 200 witnesses. In the parties' Initial Rule 26(a)(1) Disclosures, and defendants' responses to interrogatories, 158 different potential witnesses were identified. Additional potential witnesses have also been identified in the hundreds of thousands of documents that have been produced thus far by defendants and third parties.

13. Although the discovery process on EchoStar's behalf includes efforts by at least thirteen (13) attorneys at two (2) law firms, the parties will be challenged to complete all relevant discovery by the June 1, 2001 discovery cutoff given the current state of discovery and the fact that the parties are still today exchanging documents.

14. A significant portion of EchoStar's discovery is directed to issues raised by DIRECTV in its Motion. As discussed more fully below, EchoStar is seeking documents and information that will prove the following facts, among other things:

- a) DBS is in a separate product market from alternative sources of programming, including cable television;
- b) A significant number of DBS subscribers view DIRECTV and EchoStar as a significantly closer substitutes than alternative sources of programming, including cable television;
- c) Cable television is an imperfect and comparatively weak substitute for DBS;

product doctrine.

² Defendants have produced approximately 387,000 pages, third parties have produced approximately 80,000 pages and EchoStar has produced approximately 2.5 million pages.

- d) If not constrained by EchoStar, DIRECTV could raise its prices above the competitive level without experiencing a significant constraint by cable;
- e) DBS and/or High Power DBS is superior to most cable services in several respects, including higher quality picture, substantially more programming options, and pay-per-view in a "near-on-demand" environment that consumers find more attractive than the pay-per-view environment offered by cable;
- f) Significant numbers of consumers have subscribed to both DBS and/or High Power DBS service and cable service, reflecting that the two products are imperfect substitutes;
- g) EchoStar is DIRECTV's closest competitor;
- h) Many, if not most, consumers who would switch away from EchoStar if it raised its prices relative to all other subscription programming services would turn to DIRECTV;
- i) DIRECTV expects to profit from raising EchoStar's costs since other potential satellite providers cannot easily enter the market and attract the customers that EchoStar is losing as a result of DIRECTV's conduct;
- j) There are significant entry barriers to the DBS and/or High Power DBS market;
- k) DIRECTV and EchoStar react primarily to each other when setting equipment and service prices;
- l) High Power DBS is the only multichannel television transmission service capable of serving the entire continental United States;
- m) Millions of potential DBS and/or High Power DBS customers live in areas that do not have access to cable such that, if there is no competition between DIRECTV and EchoStar, there is no competition at all;
- n) High Power DBS is the only choice for consumers desiring a broad range of premium sports broadcasting, such as access to all professional sports league games; and
- o) Consumers desiring as broad a range of television programming and entertainment options as possible, comprehensive premium sports coverage, maximum clarity of video and audio transmission, and ease of installation and operation have no alternative to High Power DBS service, since cable does not offer such choices.

15. Information corroborating several of the above-referenced facts has been disclosed in the numerous documents produced by DIRECTV, RCA and various third-party witnesses; however, obtaining and reviewing all of the needed documentation, and then conducting necessary depositions, will take a considerable amount of time by numerous different lawyers on EchoStar's behalf.

16. DIRECTV has already produced more than 300,000 pages of documents. RCA has produced more than 80,000 pages of documents and third parties have produced more than 80,000 pages of documents. DIRECTV only recently professed to have produced all documents responsive to EchoStar's document request, and produced more than 44,000 pages of documents in September 2000 alone. Furthermore, RCA did not produce a single document until August 15, 2000, and produced additional materials, consisting of thirty (30) videotapes, four (4) audio cassettes and two (2) computer discs in late September 2000.

17. To facilitate efficient document review and management, the parties have been producing documents in electronic format on CDs. EchoStar hired a third-party vendor to process these CDs, print out the documents contained on the CDs, and create a database in which the documents can be searched according to various issue codes.

18. Although EchoStar is proceeding with document review and management efficiently and diligently, the process has not moved as quickly as EchoStar had hoped it would. For example, DIRECTV's CDs that were produced in a multi-page "TIF" format caused the third-party vendor difficulty in formatting and printing the documents. Thereafter, DIRECTV reproduced some of its earlier CDs. There have been similar technical problems with the CDs that RCA produced.

19. The process of having EchoStar's third-party vendor put the documents in a database, issue code and print the documents for EchoStar's counsel has also been extremely time consuming. For example, EchoStar's third-party vendor is still in the process of printing all documents produced by DIRECTV in its July 31, 2000 and September 2000 productions. Consequently, EchoStar's counsel has not had an opportunity to review any of the approximate 105,000 pages that comprise these productions.

20. EchoStar thus has not had a chance to fully review and analyze all of the documents that have been produced thus far by the defendants and third parties. Many of these documents were produced to EchoStar only after lengthy disputes and/or after the Court granted, in part, EchoStar's motion to compel. Furthermore, many of these discovery responses generally directed EchoStar to obtain the answer from documents and erroneously relied upon Rule 33(d) as a justification. However, DIRECTV improperly cited to Rule 33(d) because DIRECTV has not specified where, in the 300,000 pages of documents, many of these answers may be found. They simply generically told EchoStar to get the answer from the documents.

21. The sheer number of documents is staggering, including the massive number of documents that were reviewed but nevertheless turned out to be nonresponsive to EchoStar's discovery requests.

22. In a September 12, 2000 letter, DIRECTV's counsel indicated that he believed certain privileged documents were inadvertently produced by DIRECTV to EchoStar and that DIRECTV would check to see if any additional documents had inadvertently been produced. DIRECTV's counsel indicated that, due to the volume of DIRECTV's production (more than 300,000 pages), it would take DIRECTV several weeks to complete this process of checking the

documents that it produced. See letter from DIRECTV counsel dated September 12, which is attached hereto as Exhibit 1.

23. DIRECTV's own statement underscores the amount of time necessary for EchoStar to review and evaluate all documents produced by the defendants and third parties, which will possibly lead to a second round of document discovery and ultimately to deposition discovery.

24. To date, no depositions have been taken. The parties attempted to schedule several depositions in May 2000 and have since discussed beginning depositions in November 2000; however, document discovery is taking longer than anyone intended and, as discussed above, RCA did not even begin producing its documents until mid-August 2000.

25. Pursuant to the Scheduling Order, each side is limited to thirty-five (35) fact witness depositions. Because there are more than 200 potential witnesses in this matter, selecting appropriate deponents is an arduous task in itself. Although there are obvious party witnesses who will be deposed, the task of deciding which third parties to depose is one that can be completed only after voluminous document discovery is completed. EchoStar's counsel has had the opportunity to evaluate the hundreds of thousands of pages of documents produced and conducted as many informal interviews of third-party witnesses as possible.

26. EchoStar's discovery efforts have focused on several issues, including defining the relevant market and DIRECTV's market power. These issues are raised by DIRECTV in its Motion. The following discusses EchoStar's discovery efforts to date relating to these particular issues:

II. ECHOSTAR'S DISCOVERY EFFORTS WITH RESPECT TO DIRECTV

A. EchoStar's First Request for Production to DIRECTV

27. EchoStar served its First Requests for Production on DIRECTV on March 14, 2000. This was EchoStar's first effort at obtaining discovery, which occurred on the earliest possible date that discovery was allowed to be propounded – the very day that EchoStar had its initial meet and confer with defendants' counsel. DIRECTV provided its responses and objections to these Requests on April 18, 2000. A copy of the Responses and Objections is attached hereto as Exhibit 2.

28. EchoStar directed these requests to, among other things, the definition of the relevant market, adverse effect on competition, exclusive dealing, market share, who DIRECTV was attempting to compete against, relationships with retailers, details of dealings and information about retailers, payments and incentives to retailers, refusals and threats of refusals by DIRECTV to enforce exclusive dealings, manufacturers of DBS equipment, and manufacturers of HDTV sets. .

29. EchoStar desires this information for the purpose of, and anticipates using all of this information in, demonstrating the relevant product market is the DBS Market, DIRECTV's market power, and the anticompetitive effects caused by that power.

30. Specifically, EchoStar requested that DIRECTV produce, among other things, the following documents:

- Request No. 4 - Any and all customer service scripts, videotapes, Documents, brochures or other communications directed at Dish Network subscribers or potential DBS subscribers which mention, refer to, or relate to EchoStar or Dish Network.

- Request No. 32 - Any and all monthly, quarterly and yearly financial reports (including but not limited to balance sheets, income statements, profit and loss statements and other similar documents) of each Defendant including, but not limited to, any and all monthly management reports or reporting packages of each Defendant.
- Request No. 33 - Any and all monthly subscriber reports or other Documents that refer relate to or evidence the number of customers subscribing to DTV including the number of subscribers to any particular service or package and/or that analyze or reflect the average revenue per subscriber, including but not limited to Documents which show the gross revenues and profits derived by any Defendant on a per package and per service basis.
- Request No. 34 - Any and all Documents which analyze, refer to or relate to the costs associated with acquiring subscribers.
- Request No. 35 - Any and all budgets, projections, multi year plans, or other forward looking analyses which refer or relate to the sale or marketing of DBS and/or High Power DBS service and/or equipment and or the sale or marketing of HDTV products.
- Request No. 36 - Any and all marketing plans, or other Documents that mention, refer to or relate to any of the Defendants' marketing strategies (including but not limited to Documents analyzing the successes or failures of those plans or strategies) or marketing of their DBS and/or High Power DBS equipment or services, and/or that mention, refer to or relate to any program, practice or strategy to convert Dish Network subscribers to DTV.
- Request No. 37 - Any and all studies, surveys or analyses which mention or refer to potential subscribers to DBS and/or High Power DBS equipment or services, including but not limited to any particular, design, feature or service offered.
- Request No. 38 - Any and all Documents which refer to, relate to or mention competition by EchoStar, or any other party, to Defendants' DBS and/or High Power DBS equipment or services.

31. Between April and July 2000, the parties participated in numerous telephonic conferences and a lengthy exchange of correspondence regarding disputes with respect to DIRECTV's responses to EchoStar's First Requests for Production of Documents.

equipment or services to any retailer, distributor or wholesaler that sells or markets any other DBS and/or High Power DBS equipment or services.

- Request No. 17 - Any and all Documents, including but not limited to agreements and all correspondence, e-mails or memoranda related thereto, which refer to, relate to or evidence the relationship or potential relationship between Defendants and any professional Sports League, including but not limited to, the National Football League, the National Basketball Association, the National Hockey League, and Major League Baseball.
- Request No. 18 - Any and all Documents, including but limited to, subscriber lists or data, which identify all subscribers to any professional sports programming package offered by any Defendant including, but not limited to, the total revenue derived from subscribers who subscribe to any package of professional sports programming offered by any Defendant.
- Request No. 19 - Any and all Documents which refer to or relate to EchoStar's efforts to obtain professional sports programming.
- Request No. 20 - Any and all Documents which discuss the benefits of delivering or providing professional sports programming to subscribers of DTV or EchoStar or to potential DBS subscribers.
- Request No. 21 - Any and all Documents that refer to, relate to or evidence any payments, offer of payments, monetary incentives, inducements, economic benefits, or other consideration given or offered by any Defendant to any Sports League, including but not limited to, the National Football League, the National Basketball Association, the National Hockey League, and Major League Baseball.
- Request No. 22 - Any and all Documents, including but not limited to agreements and all correspondence, e-mails or memoranda related thereto, which refer to, relate to or evidence the relationship or potential relationship between any Defendant and any manufacturer of High Definition Television sets and/or any manufacturer of DTV compatible technology or equipment.
- Request No. 23 - Any and all Documents, including but not limited to, agreements and all correspondence, e-mails or memoranda related thereto, which refer to, relate to or evidence the relationship between DTV and RCA both as it relates to the ownership and the manufacturing, marketing and sale of DTV-compatible DBS and/or High Power DBS service and/or equipment.
- Request No. 30 - All Documents that mention, describe or relate to the product or geographic markets in which each Defendant operates.

- Request No. 5 - Any and all Documents which mention or refer to the market share of DTV and/or EchoStar and Dish Network.
- Request No. 6 - Any and all advertisements, marketing materials, promotional materials, web site pages, or other similar type documents which mention EchoStar, Dish Network, or their services or products.
- Request No. 9 - Any and all Documents which mention refer or relate to the sale of Primestar and/or its assets to any Defendant including but not limited to all agreements incident to the sale and all Documents reviewed in connection with the sale, and/or which mention or refer to previous subscribers to Primestar's satellite service who have switched or converted to either DTV or Dish Network services
- Request No. 10 - Any and all Documents that mention, refer to or relate to any retailer's, distributor's or wholesaler's sale or marketing of EchoStar or Dish Network equipment or services.
- Request No. 12 - Any and all Documents, including agreements, correspondence, e-mails or memoranda, which refer to, relate to or evidence any program affiliation agreements or other similar Documents evidencing or relating to the terms of any agreement between any Defendant and any video program supplier.
- Request No. 13 - Any and all Documents, including but not limited to agreements and all correspondence, e-mails or memoranda related thereto, which refer to, relate to or evidence the relationship or potential relationship between any Defendant and any retailer, wholesaler or distributor of DTV compatible DBS and/or High Power DBS service and/or equipment.
- Request No. 14 - Any and all Documents which show the volume of sales or purchases, by any retail or wholesale outlet, of DTV compatible DBS and/or High Power DBS equipment or services.
- Request No. 15 - Any and all Documents that refer to any payments, offer of payments, monetary incentives, inducements, economic benefits, or other consideration given or offered by any Defendant to any retailer, wholesaler or distributor that sells and/or markets DTV-compatible DBS and/or High Power DBS service and/or equipment to the exclusion of other DBS and/or High Power DBS service and/or equipment, and/or the difference in consideration or benefits provided to retailers, wholesalers or distributors that do not sell or offer for sale any EchoStar or Dish Network equipment or services.
- Request No. 16 - Any and all Documents that refer or relate to any Defendant's refusal and/or threat of refusal to sell and/or market DBS and/or High Power DBS

32. Through resolutions reached during these meetings and correspondence, and through DIRECTV's responses, DIRECTV has produced 55 CDs, which contain more than 313,000 pages of documents. The following illustrates the rolling nature of DIRECTV's production of documents:

<u>Date Produced</u>	<u>CD No.</u>	<u>Total No. of Pages</u>
4/20/00	1	10,276
4/20/00	2	7,630
4/20/00	3	8,450
4/20/00	4	3,457
4/20/00	5	3,328
4/20/00	6	1,993
4/20/00	7	2,580
4/20/00	8	5,964
4/20/00	9	7,354
4/20/00	10	5,921
4/20/00	11	425
4/26/00	12	6,339
4/26/00	13	6,967
4/26/00	14	9,091
4/26/00	15	705
4/26/00	16	12,979
4/26/00	17	8,254
4/26/00	18	4,649
4/26/00	19	10,929
4/26/00	20	5,674
4/26/00	21	2,970
4/26/00	22	3,495
4/26/00	23a	2,070
4/26/00	23b	1,288
4/26/00	24	2,088
4/26/00	25	3,665
4/27/00	26	5,020
4/27/00	27	3,393
4/27/00	28	5,626
5/10/00	29	5,721
5/5/00	30	4,199
5/5/00	31	2,310
5/5/00	32	2,031

<u>Date Produced</u>	<u>CD No.</u>	<u>Total No. of Pages</u>
5/5/00	33	8,601
5/5/00	34	1,401
5/5/00	35	1,957
5/5/00	36	6,464
5/5/00	37	3,188
5/5/00	38	998
5/18/00	39	7,751
5/18/00	40	228
5/18/00	41	2,230
5/18/00	42	858
6/9/00	43	6,631
6/9/00	44	40
7/31/00	45	10,791
7/31/00	46	8,763
7/31/00	47	2,546
7/31/00	48	313
7/31/00	49	970
9/11/00	50	4,983
9/11/00	51	4,407
9/11/00	52	1,589
9/11/00	53	3,501
9/18/00	54	14,728
9/18/00	55	88
5/12/00	SD1	4,322
5/12/00	SD2	11,496
6/1/00	SD3	8,129
7/25/00	SD4	2,256
7/28/00	SD5	961
7/31/00	SD6	2,256
8/22/00	SD7	7,929
9/11/00	SD8	13,261
9/11/00	SD9	3,280
TOTAL		313,757

33. DIRECTV has only recently professed to have completed its production, some six (6) months after EchoStar first served its document requests. In September 2000 alone, DIRECTV produced eight (8) additional CDs that contain approximately 44,000 pages of documents. Thus, although EchoStar and DIRECTV tentatively resolved most of their discovery disputes, EchoStar has reserved the right to file a motion to compel when it has had the opportunity to review all of DIRECTV's documents and to assess whether there are any deficiencies.

34. EchoStar is in the process of reviewing these approximately 313,000 pages for relevant information. Although EchoStar's counsel has been diligently reviewing the ongoing document productions, the review has not been completed, in part because the production has only recently professed to have been completed.

35. In addition, as noted above, because of the logistics of having EchoStar's third-party vendor process the CDs, EchoStar's counsel has not yet begun reviewing any documents produced that DIRECTV produced after July 31, 2000. Thus, EchoStar's counsel still needs to review, in the first instance, more than 100,000 pages of DIRECTV documents. EchoStar expects to receive these additional 100,000 plus pages from its third-party vendor beginning November 1, 2000.

36. As EchoStar's attorneys review documents, they have been providing relevant material to EchoStar's experts for further review and analysis. The experts, however, will not have all relevant documents to assist in formulating their opinions until DIRECTV completes its document production and EchoStar's attorneys first have had an opportunity to review such documents.

37. The sheer volume of documents produced by DIRECTV and others has required a near full-time commitment to this matter by several attorneys; despite the diligence of EchoStar's attorneys, however, this review is not yet completed.

B. EchoStar's First Set of Interrogatories to DIRECTV

38. EchoStar served its First Set of Interrogatories on DIRECTV on March 14, 2000, the first day on which it could begin discovery. This was among EchoStar's first effort at obtaining discovery, which occurred on the earliest possible date that discovery was allowed to be propounded – the very day that EchoStar had its initial meet and confer with defendants' counsel. DIRECTV responded and objected to EchoStar's First Set of Interrogatories on April 18, 2000. A copy of the Responses and Objections is attached hereto as Exhibit 3.

39. EchoStar's interrogatories were directed to, among other things, identification of the following: DIRECTV personnel responsible for negotiating agreements between defendants and professional sports leagues, HDTV manufacturers and retailers; retailers of DIRECTV-compatible DBS equipment and services and the sales, pricing structures, benefits and terms relating to DIRECTV and these retailers; HDTV products and manufacturers; and damages claimed by DIRECTV.

40. Many of these Interrogatories requested the identities of specific individuals or retailers for the purpose of directing EchoStar to other sources from which EchoStar could obtain information about DIRECTV and DIRECTV's control and effect on the DBS Market. For example, the third party retailers will have information about how DIRECTV exercises its market power by requiring exclusive contracts, how DIRECTV views EchoStar as its chief rival in the DBS Market and the effects on the market caused by DIRECTV's demand for exclusivity.

- Request No. 32 - Any and all monthly, quarterly and yearly financial reports (including but not limited to balance sheets, income statements, profit and loss statements and other similar documents) of each Defendant including, but not limited to, any and all monthly management reports or reporting packages of each Defendant.
- Request No. 33 - Any and all monthly subscriber reports or other Documents that refer relate to or evidence the number of customers subscribing to DTV including the number of subscribers to any particular service or package and/or that analyze or reflect the average revenue per subscriber, including but not limited to Documents which show the gross revenues and profits derived by any Defendant on a per package and per service basis.
- Request No. 34 - Any and all Documents which analyze, refer to or relate to the costs associated with acquiring subscribers.
- Request No. 35 - Any and all budgets, projections, multi year plans, or other forward looking analyses which refer or relate to the sale or marketing of DBS and/or High Power DBS service and/or equipment and or the sale or marketing of HDTV products.
- Request No. 36 - Any and all marketing plans, or other Documents that mention, refer to or relate to any of the Defendants' marketing strategies (including but not limited to Documents analyzing the successes or failures of those plans or strategies) or marketing of their DBS and/or High Power DBS equipment or services, and/or that mention, refer to or relate to any program, practice or strategy to convert Dish Network subscribers to DTV.
- Request No. 37 - Any and all studies, surveys or analyses which mention or refer to potential subscribers to DBS and/or High Power DBS equipment or services, including but not limited to any particular, design, feature or service offered.
- Request No. 38 - Any and all Documents which refer to, relate to or mention competition by EchoStar, or any other party, to Defendants' DBS and/or High Power DBS equipment or services.

31. Between April and July 2000, the parties participated in numerous telephonic conferences and a lengthy exchange of correspondence regarding disputes with respect to DIRECTV's responses to EchoStar's First Requests for Production of Documents.

32. Through resolutions reached during these meetings and correspondence, and through DIRECTV's responses, DIRECTV has produced 55 CDs, which contain more than 313,000 pages of documents. The following illustrates the rolling nature of DIRECTV's production of documents:

<u>Date Produced</u>	<u>CD No.</u>	<u>Total No. of Pages</u>
4/20/00	1	10,276
4/20/00	2	7,630
4/20/00	3	8,450
4/20/00	4	3,457
4/20/00	5	3,328
4/20/00	6	1,993
4/20/00	7	2,580
4/20/00	8	5,964
4/20/00	9	7,354
4/20/00	10	5,921
4/20/00	11	425
4/26/00	12	6,339
4/26/00	13	6,967
4/26/00	14	9,091
4/26/00	15	705
4/26/00	16	12,979
4/26/00	17	8,254
4/26/00	18	4,649
4/26/00	19	10,929
4/26/00	20	5,674
4/26/00	21	2,970
4/26/00	22	3,495
4/26/00	23a	2,070
4/26/00	23b	1,288
4/26/00	24	2,088
4/26/00	25	3,665
4/27/00	26	5,020
4/27/00	27	3,393
4/27/00	28	5,626
5/10/00	29	5,721
5/5/00	30	4,199
5/5/00	31	2,310
5/5/00	32	2,031